Brooks Brothers, A Division of Garfinckel, Brooks Brothers, Miller & Rhoads *and* United Food & Commercial Workers Union, Local 400, UFCW International, AFL-CIO. Cases 5-CA-12778, 5-CA-12842, and 5-RC-11326

May 13, 1982

DECISION, ORDER, DIRECTION, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 2, 1981, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in opposition to Respondent's exceptions and in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as further explained below, and to adopt his recommended Order,[2] as modified.

The Administrative Law Judge found, *inter alia*, that Respondent violated Section 8(a)(1) of the Act through certain statements by Assistant Manager Linton to a group of employees. Respondent contends that the statements in question did not constitute an unlawful threat, as found by the Administrative Law Judge. We find merit in this contention.

Within 10 days of the election, salesman David C. Barron, a union adherent, overheard Assistant Manager Linton speaking on the floor of the store to employees Margaret Vita, Mary Jane Young, and George Stringer. Barron described what transpired as follows: Linton stated that "he knew for a fact that with a union contract there was no guarantee of higher commission rates or drawer rates"[3] and he knew of instances "where they had gone down with a union contract." Barron then walked over and challenged Linton's comment by stating he had no basis for it and asked "why should we believe you." Linton replied that the employees had nothing in writing from the Union to which Barron retorted "we don't have anything in writing from the company which is one of the reasons we want a union." Barron then told the group how commissions are computed at an area store (where employees are represented by the Union), and the added benefits of a union which he said "would help management also." Linton did not respond. The Administrative Law Judge concluded that Linton's statement about commissions was a threat to lower wages in reprisal for union activity and therefore violated Section 8(a)(1). We disagree.

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969), the Supreme Court set forth a standard by which such conduct may be judged:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'

Thus, the Board has found the statement that the Union would not automatically bring increased benefits is proper, *C & K Coal Company*, 195 NLRB 1038 (1972), and we find that Linton's conduct is of a similar nature.

Linton did no more than express his view that there was no guarantee of a higher commission if the Union were elected and that he knew of instances when commissions had gone down with a union contract. The statement that there was no guarantee of a higher commission was a truthful statement or, at the least, a noncoercive expression of Linton's views. Further, Linton described the lowering of commission rates as a product of a collective-bargaining agreement, rather than as the result of the advent of a union. Finally, Barron was able to counter Linton's statements and speak to the same employees at some length without chal-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge has recommended a broad cease-and-desist order. In *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we held that such broad injunctive language is warranted only when a respondent has been shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' fundamental statutory rights. Contrary to the Administrative Law Judge, we do not find that the instant violations meet this test. Consequently, we shall modify the Administrative Law Judge's recommended Order to require the Respondent to cease and desist from violating the Act "in any like or related manner."

To assure a "make-whole" remedy for Respondent's unlawful discharge of Ira Kurtz, we shall additionally order Respondent to expunge from its files any reference to the October 24, 1980, discharge of Ira Kurtz and to notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future discipline against him.

[3] The amount of the commissions for sales personnel and the method of computation of commissions were issues in the election campaign. All Washington sales personnel are paid strictly on commission, receiving a weekly draw and a monthly commission check from which this draw is deducted.

lenge from Linton. Given these circumstances, Linton's statement was not a coercive threat that Respondent would lower wages. Thus, we do not find this conduct to be a violation of Section 8(a)(1).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Brooks Brothers, A Division of Garfinckel, Brooks Brothers, Miller & Rhoads, Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order as so modified:

1. Substitute the following for paragraph 1(b):

"(b) Threatening employees with loss of benefits if they should select the Union as their bargaining agent."

2. Substitute the following as paragraph 1(j):

"(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act."

3. Insert the following as paragraph 2(c) and reletter subsequent paragraphs accordingly:

"(c) Expunge from its files any reference to the discharge of Ira Kurtz on October 24, 1980, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future discipline against him."

4. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that Case 5-RC-11326 be, and it hereby is, severed from Cases 5-CA-12778 and 5-CA-12842, and that it be, and it hereby is, remanded to the Regional Directior for Region 5 for further processing in accordance with the Direction below.

DIRECTION

It is hereby directed that, as part of the investigation to ascertain a representative for the purposes of collective bargaining with the Employer, the Regional Director for Region 5 shall, pursuant to the Board's Rules and Regulatons, Series 8, as amended, within 10 days from the date of this Decision, Order, and Direction, open and count the ballot cast by Ira Kurtz, and cause to be served on the parties a revised tally of ballots including therein the count of the above-mentioned ballot. Thereafter, the Regional Director shall issue a Certification of Representative if the Union received a majority of the votes cast according to the revised tally. In the event that the Union did not receive such a majority, it is further ordered that the election conducted on November 21, 1980, be, and it hereby is, set aside, and that a new election be conducted in accordance with the following:

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate employees concerning their union sentiments and activities.

WE WILL NOT implement or announce other increases in wages or benefits for the purposes of influencing the outcome of a representation election.

WE WILL NOT threaten employees that their union activities will be remembered and held against them when they are considered for promotion to management positions.

WE WILL NOT threaten employees with loss of benefits because they select a collective-bargaining agent.

WE WILL NOT insist that employees read company campaign literature and WE WILL NOT inquire of them whether they have done so.

WE WILL NOT attempt to dissuade employees from supporting a union by telling commission salesmen that we have remedied an overstaffing problem by discharging employees.

WE WILL NOT confer a benefit upon commission salesmen during the course of an organizing campaign by discharging a salesman in order to enhance the earning opportunities of remaining salesmen.

WE WILL NOT tell employees that their union sympathies and activities are the subject of company surveillance.

WE WILL NOT discharge or otherwise discriminate against employees because of their membership in or activities on behalf of United Food and Commercial Workers Union, Local 400, UFCW International, AFL-CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in

the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act. These rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for their mutual aid and protection.

WE WILL offer full and immediate reinstatement to Ira Kurtz to his former or substantially equivalent employment, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of pay or benefits which he may have suffered because of the discrimination pacticed against him, with interest.

WE WILL expunge from our files any references to the discharge of Ira Kurtz on October 24, 1980, and WE WILL notify him that this has been done and that evidence of this unlawful discharge will not be useed as a basis for future discipline against him.

All of our employees are free to become or remain members of that Union.

BROOKS BROTHERS, A DIVISION OF GARFINCKEL, BROOKS BROTHERS, MILLER & RHOADS, INC.

DECISION

FINDINGS OF FACT

STATEMENT OF THE CASE

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before me in Washington, D.C., upon a consolidated unfair labor practice complaint,[1] issued by the Acting Director of the Board's Region 5, which alleges that Respondent Brooks Brothers, A Division of Garfinckel, Brooks Brothers, Miller & Rhoades, Inc.,[2] violated Section 8(a)(1) and (3) of the Act.

Consolidated with this complaint case are objections filed by United Food and Commercial Workers Union, Local 400, UFCW International, AFL-CIO (herein called Union or Local 400), to the conduct of a representation election which occurred on November 21, 1980, as well as challenges filed by the Union and Respondent to the eligibility of two voters who sought to participate in that election.

More particularly, the consolidated amended complaint alleges that Respondent threatened employees with lower sales commissions, stricter attendance rules, and loss of benefits if they selected the Union as their collective-bargaining representative; coercively interrogated employees concerning their union sympathies and activities; created among employees the impression that their union activities were subject to company surveillance; threatened employees with the loss of retirement benefits if they selected the Union as their bargaining representative; instituted a dental care plan to dissuade employees from supporting the Union; and discharged Ira R. Kurtz on October 24, 1980, because of his membership and activities on behalf of the Union. The objections to the conduct of the election parallel the allegations of unfair labor practices contained in the amended consolidated complaint.[3]

Respondent denies the commission of any independent violations of Section 8(a)(1) or engaging in any objectionable conduct. It asserts that the announcement of a new dental insurance plan before the election was not designed to influence the result of the election but was made in accordance with its longstanding practice of periodically reviewing and enlarging employee fringe benefits. Respondent asserts that Kurtz was discharged because of an overstaffing problem at its Washington, D.C., store and was selected for discharge because he was the junior employee on the staff, was still in probationary status, and was an unsuitable employee.

The ballot of Ira R. Kurtz was challenged by Respondent because he was no longer an employee on November 21, 1980, the date of the election, and the validity of his ballot rests upon a determination of whether or not he was discharged illegally. The Union challenged the ballot of Sandra Ellis, the office manager, on the basis that she was and is a supervisor. Respondent contends that she was and is a rank-and-file employee who

[1] The principal docket entries in the complaint cases are as follows: Charge filed in Case 5-CA-12778 against Respondent by the Union on November 17, 1980; complaint issued by the Acting Director, Region 5, against Respondent on December 30, 1980; Respondent's answer filed on January 12, 1981; charge in Case 5-CA-12842, filed by the Union against Respondent on December 15, 1980; first amended charge December 30, 1980; complaint issued by Acting Director, Region 5, against Respondent on January 8, 1981; Respondent's answer in Case 5-CA-12842, filed on on January 19, 1981; hearing held in Washington, D.C., on September 21, 22, 23, and October 2, 1981; briefs filed with me by the General Counsel, the Charging Party, and Respondent on or before November 16, 1981.

The principal docket entries in the companion representation case are as follows:

Representation petition filed by the Union herein on September 22, 1980, seeking an election in a unit composed of all of Respondent's full-time and regular part-time selling and nonselling personnel, exclusive of casual and seasonal employees, employees represented by another labor organization, guards, and supervisors as defined in the Act who are employed at Respondent's Washington, D.C., retail store; Stipulation for Certification Upon Consent Election approved by the Director, Region 5, on October 30, 1980; election held on November 21, 1980, resulting in 19 votes for the Petitioner, 18 votes against the Petitioner, and two remaining challenges; timely objections to the conduct of the election were filed by the Petitioner on December 1, 1980; report on challenges and objections and order consolidating cases issued by the Acting Director, Region 5, on January 26, 1981.

[2] Respondent admits, and I find, that it is a Virginia corporation which operates a retail department store in the District of Columbia. During the preceding 12 months, a representative period, Respondent had gross revenues in excess of $500,000 and purchased and received at its Washington, D.C., store directly from points and places located outside the District of Columbia goods and merchandise valued in excess of $50,000. Accordingly, Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] The critical period for objectionable conduct ran from September 22, 1980, until November 21, 1980.

was eligible to vote in the representation election. Upon these contentions, the issues herein were joined.[4]

I. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent Brooks Brothers is a chain of retail stores specializing in the manufacturing and sale of high quality clothing and accessory items. Its 26 retail stores and three factories are operated from its headquarters office in New York City. These stores, including the Washington, D.C., store involved in this proceeding, employ about 1,400 people and are found in most major metropolitan areas in the United States. Brooks Brothers is owned by a holding company which in part bears its name and whose headquarters is in Washington, D.C., a few blocks from the Washington Brooks Brothers store. At the time of the hearing in this case, the holding company also controlled Garfinckel's, a chain of department stores in the Washington metropolitan area, and some other retail chains in the Virginia Tidewater Area and elsewhere in the United States. Garfinckel's employs about 1,200 full-time employees in the Washington area. The companies owned by the holding company employ an aggregate of 7,500 full-time employees throughout the country.

The Washington Brooks Brothers store employs about 40 unit employees including 25 full-time salesmen and women. None of these employees have been represented by a labor organization.[5] It also employs about 30 tailors who are represented by the Amalgamated Clothing Workers Union. The Washington store was formerly operated on the second floor of a building located at Connecticut Avenue and L Streets. On May 10, 1980, the store moved about three blocks to its present location and 19th and L Streets, Northwest.

All of the Washington sales personnel are paid strictly on a commission basis. They receive $175 for a weekly draw and get a monthly commission check from which the draw is deducted. In addition, they receive a number of fringe benefits, such as health insurance and vacation pay, the cost of which the Company bears. Because of the fact that clothing salesmen are compensated on a commission basis, an increase in the number of salesmen can result in a reduction in the earnings of all salesmen unless there is a corresponding increase in sales volume. For this reason, the hiring of new salesmen is generally looked upon with disfavor by incumbent salesmen, while a reduction in force usually inures to their financial benefit. In the store's former location, there were seven salesmen in the men's clothing department. At the time of Kurtz's discharge, which occurred about 5 months after the store moved, there were 12 salesmen in that department. There is agreement among the parties that the sales volume of the store increased after the move, but there is a dispute (and the record is unclear) whether the increase in sales was proportionate to the increase in personnel in the men's clothing department.

In the spring of 1980, before the store moved to its present location, former Store Manager Robert Bates mentioned to a number of employees his intention to hire more salesmen. This announcement produced a strong and immediate negative reaction. Saleswoman Mary Maloney phoned Bates in New York while he was in the process of making a visit to the home office and told Bates that the employees were beginning to talk about forming a union. Immediately upon his return to Washington, Bates held a meeting with the sales force and informed them that he would limit new hiring to one salesman.

During this same period of time, salesman David C. Barron was given a 3-month evaluation by Bates and former Assistant Store Manager Robert Moran. Such reviews were normally given at the end of a new employee's 90-day probationary period. During the review, Barron generally received good marks but was told by Bates that going to meetings after work to discuss union activities was not considered constructive behavior. I credit Barron's testimony to the effect that, on this occasion, Moran told Barron that, if he did not see a change in the near future, his job would be in jeopardy.

The union organizing effort began in the summer of 1980 when two or three salesmen went to the UFCW International office, located near the Washington store, and asked for assistance. They were put in contact with Local 400, the UFCW's local in the Washington metropolitan area, and were given union cards to be circulated among the sales staff at the store. On July 31, 1981, Ira R. Kurtz was hired by Respondent as a clothing salesman. Kurtz had been a salesman for Raleigh's, a unionized clothing retailer in Washington, for a period of about 4 years. Between his service with Raleigh's and his employment with Respondent he was briefly employed by a stock brokerage firm. While at Raleigh's, Kurtz worked at its Landmark store in Northern Virginia and served as the Local 400 shop steward in the store.

On September 22, 1980, the Union filed a petition seeking an election among regular part-time and full-time selling personnel at the Washington store. From that point on a spirited campaign ensued. Moran and Larry Linton, the other assistant store manager, regularly and repeatedly handed out literature to unit personnel in opposition to the organizing drive. Much of the literature was authored or obtained from Joseph Maloney, Respondent's Vice president in charge of personnel.[6] A common theme, repeated by Respondent in oral statements relating to the union drive as well as in company literature, was that Local 400 was merely using the organization of the Brooks Brothers store as a springboard for a future effort at Garfinckel's, a much larger store in the Washington area which assertedly was the principal target of the Union's efforts. In support of this contention Respondent circulated to its employees a clipping from Women's Wear Daily, a trade publication, in which Union President Tom McNutt was quoted as saying, with reference to Brooks Brothers, "Maybe it's just a small store, but it's a foot in the door to Garfinckel's."

[4] Certain errors in the transcript have been noted and are hereby corrected.

[5] A few of Respondent's stores in the New York metropolitan area and elsewhere are organized but most are not.

[6] One of Maloney's assignments was to keep track of union drives and to provide resistance to organizing efforts in Respondent's stores. During the fall of 1980, another such drive was in progress at Respondent's Pittsburgh store.

On or about October 11, Respondent replaced Store Manager Bates with Richard Peet, who was manager of Respondent's Paramus, New Jersey, store. Shortly after Peet's arrival, clothing salesman Frank Mastro complained to him that there were too many salesmen on the floor in the men's clothing department. Peet disagreed, saying that he had figures to justify the current size of the sales force. Saleswoman Mary Maloney also voiced the same complaint to Peet with respect to salespersons generally. Peet told Mrs. Maloney that she was wrong and that the salesmen were not making less money than they previously had been making. On the following day, Peet again spoke to Mrs. Maloney on this subject. He told her that he had been wrong, had gone over figures prepared by the previous store manager, and found that salesmen were in fact making less money than before.

During the preelection period, Peet and Moran had conversations with several different employees concerning the organizing campaign. Moran spoke with Barron repeatedly on the subject, frequently doing so as he was handing out company campaign literature. I credit Barron's testimony that, on one or more occasions, Moran asked Barron what he thought he would gain by unionizing and told Barron that he was a fool to believe that a unionized store would gain him anything. Barron's standard reply was that a union would bring with it improvements in the health plan, including a dental plan, and more job security. I credit Barron's further testimony that, on one occasion, Moran reminded Barron that the latter had expressed interest in joining Respondent's management and that his union activity would be on his record, would be considered, and would not be forgotten.

On a couple of occasions, Barron discussed the Union with Peet during dinner engagements at a prominent downtown restaurant known as Clyde's. During one such dinner meeting, Peet asked Barron what his feelings were about the Union. He also asked Barron what he thought the outcome of the election might be. Barron replied that he thought the Union would win handily and Peet countered with the opinion that the Company would win. Peet told Barron on one of these occasions that, if the Union did win, there would be no status quo. When the parties went to the bargaining table, they would start out with a blank sheet of paper. Peet told Barron that things were different in Washington than at other Brooks Brothers stores which were unionized, because the corporate office (of the holding company) was located in D.C.

On another occasion, when Moran was handing out company campaign literature at the store, he told Barron that "It's going to be war and it's going to be fought at Brooks Brothers." He went on to say that the Brooks Brothers store had only 80 employees, but the corporate offices and Garfinckel's were in the same town and employed thousands of employees. He told Barron that there was no way that the employees could get what they were seeking and no guarantee that they would get anything, including the status quo, because anything the Company gave to Brooks Brothers it would have to be given to Garfinckel's employees. Barron replied that he was aware of his rights under the Taft-Hartley Act and did not think that Moran had the right to question him concerning his union activities.

Sometime between August 1980 and the election, Barron overheard Linton speaking on the floor of the store to employees Margaret Vita, Mary Jane Young, and George Stringer. Linton was saying that with a union there was no guarantee of higher commissions or higher draw rates and he knew of instances where unionization brought about lower rates. Barron butted into the conversation and stated that what Linton was saying was not true. He told Linton he had no basis for making the statement and nothing to back it up with. Linton replied that Barron had nothing in writing. Barron replied that at Raleigh's the salesmen got their commissions computed on a weekly basis. He added his opinion that he thought unionization would help management as well as employees and stated that he could not understand why the Company was against it.

On another occasion, Moran spoke to Kurtz about the Union at or near the floor of the store. I credit Kurtz' testimony to the effect that Moran asked him what he thought of the Union and whether he had any intention of joining. Kurtz' reply was that he would "go with the flow." Moran admits that, on one occasion when he was distributing campaign literature, he asked Kurtz whether he had found the time to read a letter that had recently been distributed. Kurtz said that he did not. Moran suggested that he find the time to read it and Kurtz replied that he was not about to do so. Moran then asked Kurtz if he had read the other company literature which had been distributed. Kurtz replied "No," and walked away.

Kurtz was not in fact the leader of the organizing effort at Respondent's store. However, he did sign a union card and discussed unionization at the store with several other employees. His experience as a shop steward for the same local which was organizing Respondent made him a ready source of information. I credit the testimony of Barron that, before Kurtz' discharge, both Moran and Linton admitted to him that they were aware that Kurtz had been a shop steward during his previous employment with Raleigh's. I credit the testimony of former office clerical employee Andrea Pellegrino that she overheard Office Manager Sandra Ellis tell Peet, "We know who is behind the Union—Kurtz. We sent Raleigh's for a recommendation and didn't get any and Raleigh's is a union store." I also credit the testimony of Barron that he overheard a conversation over the intrastore telephone, when he was placing a call to the office, between Miss Ellis and another individual in the company office. Miss Ellis was heard to say to her unidentified listener that she was convinced that Kurtz was handing out union cards because he was a shop steward at Raleigh's.

On Friday, October 24, Peet discharged Kurtz. At a meeting attended by Peet, Linton, Moran, and Kurtz, the latter was told that there were too many salesmen in the men's clothing department. He was also told that he was an unsatisfactory employee because he chewed a toothpick at the store, had a run-in with a customer a few days earlier, and was found sleeping on the job. Kurtz asked for a transfer to another department in the store

but his request was denied. He then accused Respondent's management of trying to get rid of him because he was a former shop steward at Raleigh's. Peet claimed that this was the first time he knew of any union affiliations on his part and that such considerations played no part in the termination.[7]

On the following morning, at a regular Saturday meeting with employees, Peet announced that he had finally solved the overstaffing problem which had given rise to several employee complaints and had done so by discharging Kurtz. Not long thereafter, Peet had occasion to talk with Mrs. Maloney concerning the events which had just transpired. Peet was asking if there was anything the employees were either happy or unhappy about and Mrs. Maloney replied that she was not particularly unhappy about anything except the firing of Kurtz. Peet retorted, "What do you mean 'you're not unhappy.' You're one of the biggest union supporters." Mrs. Maloney asked how he knew and he replied that he knew a lot of things. Peet then added, "You're a hypocrite. I get rid of one guy to make ten happy and you're still not happy." The record is undisputed that Respondent has never previously discharged or laid off a salesman in the Washington store because of an overstaffing problem.

A couple of weeks before the election, Respondent held a meeting of unit employees at the store during which they were addressed by Roxanne Horning, the director of employee benefits for the parent holding company. The nature of Miss Horning's remarks was to outline to the employees, who had gathered together in the shoe department, what benefits were currently available to them at Brooks Brothers. Employees also brought up problems they had encountered in taking advantage of these benefits, particularly in making claims for reimbursement from Blue Cross-Blue Shield. At the end of the meeting, Peet spoke up and stated that, if the Union came in, they would lose those benefits.

On November 6, 1980, a high-level meeting was held at the corporate office of the holding company which is located on K Street in Washington. The meeting was attended by representatives from Garfinckel's, Brooks Brothers, and the principal officials of what is often called the "corporate office," i.e., the parent holding company. The details of this meeting are discussed, *infra*. At this meeting, which lasted about 4 hours, the corporate office decided to institute a dental care plan for all employees at Garfinckel's and Brooks Brothers, except for those covered by collective-bargaining agreements and those already covered by dental plans.[8] The plan, which was estimated to cost about $250,000 per annum, amounted to an addendum to an existing disability insurance program which the corporation had with the Aetna Life & Casualty Company. It was scheduled to take effect on January 1, 1981, and contained a wide range of dental benefits, including preventive care protection. It covered not only employees but their dependents as well. Frank T. Reilly, president of Brooks Brothers, wrote a letter to all Brooks Brothers employees, dated November 10. The letter was distributed throughout the chain, including the Washington store, and read as follows:

> Dear Associate:
>
> I am pleased to announce to you today a significant addition to Brooks' Brothers employee benefit program-Comprehensive Group Dental Insurance.
>
> As you know, we are constantly evaluating our benefit program to ensure that it meets the real and often diverse needs of our associates.
>
> As a result of our research, we found that despite great progress made in dental care in recent years, almost all Americans—98 percent—have some form of dental disease. Many go to the dentist only for emergency treatment—others have never been to a dentist at all.
>
> We feel group dental insurance provides one of the best answers to this problem. Our plan will encourage you to seek preventive care regularly, so that minor problems will not erupt into time-consuming and costly emergencies. Here are some of the dental services which benefits will be paid under the plan:
>
> —oral examinations
> —routine cleanings
> —dental X-rays
> —fillings
> —inlays, crowns
>
> Benefits for additional services such as oral surgery, root canal therapy, installation of bridgework and dental repair will also be available under the plan.
>
> A significant feature of our plan is that an associate will be free to receive treatment by the dentist of his or her choice.
>
> All eligible associates who work 20 or more hours per week, or 1000 hours per year, will be able to obtain dental coverage for themselves and their families as well.
>
> We expect to put the new dental plan into effect January 1, 1981. Within the next several weeks we will be sending you complete information on the benefits offered to you under the plan, as well as enrollment forms.
>
> As the cost of good dental care continues to climb higher, we feel the introduction of dental coverage is an important expansion of our group medical coverage, and will represent a significant savings to you.

In addition to writing the above-quoted letter, Reilly came to Washington from his office in New York and spoke to the Washington store employees shortly before the election. He again told employees about the inauguration of the new dental plan and provided employees with the address of the Aetna personnel from whom they could obtain claim forms. After Reilly's talk, Peet told employees that the institution of the dental plan

[7] Peet testified that he did not regard Kurtz as one of the "ringleaders."

[8] The employees at a few Brooks Brothers stores already enjoyed prepaid dental plans.

proved that Respondent was trying to do something constructive about fringe benefits.

At the election on November 21, both Kurtz and Office Manager Sandra Ellis cast challenged ballots. The Union won a one-vote plurality of the ballots which were counted. The two challenged ballots remain determinative of the election.

II. ANALYSIS AND CONCLUSIONS

A. *The Supervisory Status of Sandra Ellis*

Respondent maintains that Office Manager Sandra Ellis is not a supervisor within the meaning of the Act, despite the job title which she holds. As a consequence, her ballot should be opened and counted and remarks credited to her concerning Kurtz' union background should not be vicariously attributed to the Company. It is well settled that the mere existence of a title which connotes supervisory or managerial status is not sufficient, in and of itself, to establish supervisory status as a matter of law. *N.L.R.B.* v. *Harmon Industries, Inc.*, 565 F.2d 1047 (8th Cir. 1977). In some cases, the term "office manager" has been found not to be conclusive evidence of such status. *Saladmaster Corporation*, 216 NLRB 769 (1975); *Empire Gas Inc. of Denver*, 254 NLRB 626 (1981). However, Miss Ellis has more than a mere title connoting supervisory status. The elements of her job responsibilities establish this standing as well.[9]

Miss Ellis was hired as office manager on July 14, 1980, when her predecessor, Carol Fanning, took a job as a saleswoman in the Women's Clothing department. Miss Fanning broke Miss Ellis in on the job. Miss Fanning testified credibly that the responsibilities of the office manager included interviewing clerical job applicants and effectively recommending to the store manager whether or not a particular clerical applicant should be hired.[10] She also said that it was the further responsibility of the office manager to evaluate the members of the clerical staff. Among the jobs of the office manager is scheduling vacations, time off, and the lunch hours of the clerical staff.[11] She also recommends raises for subordinates. I credit record testimony that work is assigned to clerical employees by the office manager and that, from time to time, she switches employees from a desk job in the office to the switchboard, the will-call desk, or to a cashier's post as the need arises. I also credit Miss Fanning's testimony that day-to-day assignments of work to clerical employees by assistant managers are made through the office manager.

The office manager was empowered to approve customer credit applications, the cashing of personal checks by employees, and was responsible for the preparation of the daily cash report, although that report might be initiated by another employee. She has access to all personnel files and processed information requests and applications concerning employee benefits, such as health insurance. Miss Ellis is hourly rated and works a 37-1/2 hour week. There are two full-time and four part-time clerical employees under her supervision and control. She is paid $2 per hour more than any of them except Donna Edwards and receives $1.38 per hour more than Miss Edwards. In light of these factors, I conclude that Sandra Ellis is a supervisor within the meaning of Section 2(11) of the Act. Accordingly, the challenge to her ballot is sustained and the remarks credited to her concerning Kurtz' union background should be attributed to Respondent.

B. *Independent 8(a)(1) Violations*

On November 6, 1980, just 16 days before the election, the parent company of Respondent decided to institute a costly fringe benefit for all employees in its Garfinckel's and Brooks Brothers chains, with the exception of a few employees who were already enjoying this benefit. It determined to enlarge its current Aetna insurance policy to provide dental coverage to employees and their families. Respondent announced the implementation of this plan to its Washington store employees, both in writing and orally, just a few days before the election. When an employer confers upon its employees an increase in wages or benefits during the course of a union organizing campaign, its action is presumptively a violation of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Exchange Parts, Company*, 375 U.S. 405 (1964); *N.L.R.B.* v. *Styletek, Division of Pandel-Bradford, Inc.*, 520 F.2d 275 (1st Cir. 1975); *Gordonsville Industries, Inc.*, 252 NLRB 563 (1980). It is incumbent upon any employer seeking to avoid the consequences of this presumption to justify its action on some nondiscriminatory, business-related basis. Respondent's defense in this case is that the granting of dental benefits and the announcement thereof were merely part and parcel of its ongoing effort to improve fringe benefits provided to its employees, arguing that it had been contemplating the institution of a dental plan long before the Union began its organizing drive in the Washington store. The defense is without merit.

It is quite true that Brooks Brothers officialdom had long been aware of the fact that dental plans were fast becoming a popular fringe benefit. Indeed, some Brooks Brothers retail outlets in the Metropolitan New York area and on the West Coast already had dental plans and two store managers, one from the West Coast and another from the Washington store, had pressed the corporate headquarters in Washington to come up with such a plan. It is likewise true that, from time to time, Brooks Brothers made improvements in fringe benefits throughout its system, either to meet what the competition was offering or to equalize the benefits that all Brooks Brothers employees were receiving. The Brooks Brothers Personnel Director had prevailed upon the company presi-

[9] I found Miss Ellis to be a wholly unreliable witness and have not credited her testimony on any controverted point in the absence of corroboration.

[10] While Miss Fanning and her immediate predecessor, Mary Maloney, testified in terms of what the job responsibilities of office manager called for when they held the job, there is no reason to believe that these responsibilities changed materially after Miss Ellis took the job and no credible evidence exists to suggest that they did.

[11] Miss Ellis admits that she is empowered to grant days off to clerical employees in accordance with established criteria and that she makes the judgment as to whether the reason for the requested absence is justified. Curiously, she denied that she had any authority to grant clerical employees time off for less than a day for such errands as medical appointments.

dent in June 1980 to spend $7,500 for a study of fringe benefits, including but not limited to dental plans. However, nothing happened with regard to these fine thoughts until Local 400 began to organize the Washington Brooks Brothers store and threatened to expand its effort into Garfinckel's. At that point in time, years of study and indecision suddenly crystallized into prompt action.

Respondent's testimony suggests that an intracompany tug-of-war took place concerning the inauguration of the dental plan. While Brooks Brothers headquarters in New York had spent a significant sum of money on a study of a fringe benefit plan, including dental benefits, known as the Becker Report, the report had not been completed and forwarded in writing to the members of the corporate office as of the time they actually made the decision to buy a dental plan. Roxanne Horning, the director of employee benefits, indicated that she was aware that the study was in progress but professed indifference to it and its contents. She testified that she was reacting principally to the entreaties of Garfinckel's president, Henry Detweiler, and Garfinckel's vice president in charge of personnel, Harry Vanderhort. Both men were aware of the fact that Local 400 had just won representation at Woodward and Lothrop's (Woodies), a large Washington department store which employs several thousand people. They were aware that Woodies had just negotiated a contract in November 1979, which included a dental plan and they were concerned by the announced intention of Local 400 to begin an organizing drive at Garfinckel's, a drive in which the Brooks Brothers campaign was just a stepping stone. Miss Horning testified that Detweiler expected the Local 400 drive at Garfinckel's to begin early in 1981, immediately after the end of the Christmas season. Among her various responsibilities, Miss Horning has the job of monitoring fringe benefits offered by competitors and other employers in the Washington area. She was aware that many employers, including the Federal Government, were beginning to include dental coverage in their health insurance programs.

Late in 1979, a task force composed of Garfinckel's and corporate officers began to study group insurance and life insurance programs and obtained a feasibility study concerning a dental plan. The task force recommended lower employee contribution for medical insurance, enlargement of the plan to cover all of the chains in the corporate family, and additional inquiry into the possibility of enlarging disability insurance coverage. Interestingly enough, the task force recommended to the corporate headquarters that no action be taken concerning dental insurance coverage because it felt that enlarged disability coverage had a higher priority. In March, Aetna provided the corporation with a quotation for disability coverage. The corporate office, and particularly Miss Horning, felt that the cost was exorbitant and asked for a more realistic proposal. A second set of Aetna proposals was submitted in September or October 1980, and was rejected upon the recommendation of corporate actuaries and a consultant firm.

Late in October 1980, Miss Horning asked Aetna for a proposal for dental insurance. On November 1, Aetna provided Miss Horning with quotes for two different types of dental plans. She preferred the more expensive plan because it provided for preventive as well as remedial care. A high-level meeting was "summoned," to use Miss Horning's terminology, to meet at the corporate office on November 6, to discuss this proposal.[12] Present at the meeting were principal Garfinckel's officers, corporate officers, and two Brooks Brothers officers, Reilly and Maloney. It appears from the testimony that the latter two individuals said practically nothing during the meeting. The meeting lasted 3 or 4 hours and was devoted exclusively to the subject of instituting a dental plan and specifically the high-option Aetna plan which Miss Horning was recommending. In the course of the meeting, the threat to organize Garfinckel's and the pending representation election at the Washington Brooks Brothers store were discussed and inquiry was made as to whether the plan could be promptly implemented in light of the forthcoming election on November 21. The committee decided to implement the plan, effective on January 1, and to announce the decision immediately. Miss Horning admitted at the hearing in this case that one of the reasons prompting the implementation of the plan at that time was the concern of the committee over future union activity.

As noted above, the inauguration of the dental plan was announced in writing almost immediately to all affected Brooks Brothers employees and all Garfinckel's employees. Reilly discussed the plan when he made a preelection speech to Washington store employees just before the election.

The timing of the institution of the dental plan, the admitted fear of organizational efforts by Local 400, and collateral evidence of animus, discussed *infra*, make it abundantly clear that the motivation for implementing and announcing the dental plan at the time it was implemented and announced was to head off a union drive at Garfinckel's, as well as the drive at the Washington Brooks Brothers store which Local 400 was perceived to be using as a springboard for organizing Garfinckel's. Accordingly, by implementing and announcing a program of dental insurance immediately before the November 21 election, Respondent herein violated Section (a)(1) of the Act and engaged in objectionable conduct affecting the outcome of the election.

(2) In the fall of 1980, while in the course of disseminating company campaign literature, Moran told Barron that he was a fool to think that voting for the Union would gain him anything and repeatedly asked him what he thought he had to gain by supporting the Union. These latter statements, uttered in the context in which they were stated, constitute unlawful interrogation in violation of Section 8(a)(1) of the Act and objectionable conduct affecting the results of the election.

(3) Moran's further statement to Barron—that his union activity would not be forgotten and would be on his record when and if he was considered for promotion to a management position—is a not-too-veiled threat

[12] According to Miss Horning, this meeting was an unusual if not unprecedented meeting and was not a periodic corporate committee meeting.

which violates Section 8(a)(1) of the Act and is also objectionable conduct affecting the result of the election.

(4) Peet's questions to Barron at a dinner meeting when he asked Barron what were his feelings about the Union and how he thought the election would turn out constitute unlawful interrogation which violates Section 8(a)(1) of the Act and are objectionable statements affecting the outcome of the election.

(5) Liton's statement to various employees in Barron's presence to the effect that, with a union, there was no guarantee of higher commissions or draw rates and there were instances where unionization brought about lower rates is a threat to lower wages in reprisal for union activity which violates Section 8(a)(1) of the Act and is objectionable conduct affecting the result of the election.

(6) Peet told Barron on one occasion that, if the Union did win, there would be no status quo but the parties would go to the bargaining table and start with a blank sheet of paper. It is an unfair labor practice and objectionable conduct for an employer, in the course of an organizing campaign, to tell employees that bargaining will start "from scratch" or "from the bottom up," if the thrust of these remarks is to convey the idea that Respondent will discontinue existing benefits if it has to engage in collective bargaining. *Coach and Equipment Sales Corp.*, 228 NLRB 440 (1977); *Madison-Kipp Company*, 240 NLRB 879 (1979); *Centre Engineering, Inc.*, 253 NLRB 419 (1980); *Taylor-Dunn Manufacturing Company*, 252 NLRB 799 (1980). Peet's statement to Barron on this occasion carried with it no other meaning. Accordingly, it is a threat of reprisal which violates Section 8(a)(1) of the Act and is objectionable conduct affecting the result of the election.

(7) On another occasion, in the context of a statement in which he said "It's going to be war and it's going to be fought at Brooks Brothers," Moran told Barron that there was no way that employees could get what they were seeking and no guarantee they would get anything, including the status quo, because anything the Company gave to Brooks Brothers it would have to give to Garfinckel's. For reasons set forth above in subsection (d), these remarks constitute a threat of reprisal in violation of Section 8(a)(1) of the Act and are objectionable conduct affecting the results of the election.

(8) Moran's question to Kurtz as to how he felt about the Union was coercive interrogation which violates Section 8(a)(1) of the Act and is objectionable conduct affecting the results of the election.

(9) Moran's question to Kurtz as to whether he has read company campaign literature and his insistence that Kurtz do so constitute a violation of Section 8(a)(1) of the Act and objectionable conduct affecting the results of the election.

(10) Peet's statement to Washington store employees following the discharge of Kurtz that he had solved the overstaffing problem by discharging Kurtz constitutes, under the peculiar facts and circumstances of this case, an improperly motivated grant of a benefit in the form of enlarged commission earning opportunities. It is a violation of Section 8(a)(1) of the Act and objectionable conduct affecting the results of the election.

(11) Peet's statement to employees, made at the conclusion of the meeting with Miss Horning at which fringe benefits were discussed, that employees would lose these benefits in the event of unionization constitutes a violation of Section 8(a)(1) of the Act and is objectionable conduct affecting the results of the election.

(12) Peet's colloquy with Mrs. Maloney following the discharge of Kurtz that he fired Kurtz to keep 10 people happy, his question to her as to whether she was "happy," and his statement that she was one of the strongest union supporters constitutes an unlawful announcement of a grant of benefit, coercive interrogation, and a statement that the union activities of employees were the subject of company surveillance. These statements constitute a violation of Section 8(a)(1) of the Act and are objectionable conduct affecting the results of the election.

C. *The Discharge of Ira Kurtz*

The discharge of Ira Kurtz and the reasons proffered in explanation thereof must be evaluated against a background of strong union animus and also with regard to the timing with which the discharge was accomplished. Kurtz was the junior clothing salesman in the men's clothing department. While there is no evidence that the Company followed a policy of seniority in making layoffs, the Company argues that, because of an economic retrenchment, Kurtz was the logical one to go because of his lack of seniority and because he was still a probationary employee. The shortcoming in this argument is that Respondent had never before laid off a salesman in its Washington store because of overstaffing, and well it might not, since overstaffing among commission salesmen has its principal adverse impact upon other commission salesmen, not upon the Company *per se*. Moreover, Peet admitted that he would have discharged Kurtz anyway, even if overstaffing had not been a source of employee or company concern.

In Peet's opinion, Kurtz was not a satisfactory employee. The fact that Kurtz, during his brief period of service with Respondent, a creditable record in making sales apparently played no part in this appraisal.[13] Peet complained that, during the early morning hours before customers came in the store, he noticed that Kurtz had a toothpick in his mouth and told him that, if he wanted to

[13] The commissions for salesmen (by rank) in the men's clothing department which were paid in August and September 1980 are as follows:

August 1980	September 1980
1-$2,804	1-$2,443
2—2,414	2—2,429
3—2,386	3—2,340
4—2,368	4—2,321
5—2,108	5—2,318
6—2,048	Ira Kurtz—2,128
Ira Kurtz—1,890	7—2,098
8—1,852	8—2,072
9—1,776	9—1,547
10—1,598	10—1,520
11—1,136	11—1,092

chew toothpicks, he should work for Korvette's. On October 17, a date previous to Peet's arrival on October 11 as the new store manager, Kurtz was feeling ill at the end of the day, took an aspirin, and was sitting in the service area resting and apparently asleep. Linton saw him and asked him if he did not feel well. Kurtz asked Linton if he could rest his head for a while. Linton said "ok" and walked away. In his testimony, Moran complained that Kurtz did not take stock work seriously and would simply dust off clothes hanging on the rack rather than arranging them. He also complained that, during the regular Saturday morning staff meetings, Kurtz did not participate very much and, on two occasions, seemed to "stray away." He also found Kurtz ducking out early one evening before the regular store closing time at 5:30 p.m. On another occasion, Kurtz failed to get management approval before accepting a customer check in excess of $200, as required by company policy.

These latter shortcomings were not brought to Kurtz' attention during his exit interview as the grounds for discharge. At this interview, conducted by Peet, Moran, and Linton late in the afternoon of October 24, Kurtz was told that he was being discharged because there were too many clothing salesmen, because he chewed on a toothpick, because Linton had found him sleeping on the job, and because of an incident which occurred on October 15 involving a customer named James J. Miceli. Apparently Miceli and Kurtz had a problem during a sales transaction in which Miceli asked to buy a coat for his son in New York and Kurtz had difficulty in locating the style Miceli wanted in the size which was required. When the sale was being written up, Kurtz had to figure postage and New York State sales tax into the transaction and was taking too long to suit Miceli, so he complained to Moran. During the course of their discussion, Moran sold Miceli a second coat by back-ordering it from another store. When Miceli left, he asked Kurtz for his business card. Shortly thereafter, Moran asked Kurtz what the problem was and Kurtz said that the customer had been running him about the store. In Moran's opinion, Kurtz had been in a hurry to go to lunch. This incident was recited by Peet as one of the bases for the discharge.

Kurtz protested, saying to the store management that the real reason for the discharge was his union activities. Peet professed that this was not so and that he did not even know that Kurtz was active for the Union. As noted above, Peet announced to employees the following morning that he had solved the overstaffing problem by discharging Kurtz.

Kurtz was an experienced clothing salesman who, in a short time with Respondent, had achieved a creditable sales record, one which had even brought a compliment from Peet not long before he discharged Kurtz. Kurtz was active in the organizing drive and demonstrated to Moran his indifference to the Company's strongly urged antiunion position. Kurtz was not, in fact, the most active union supporter, but he came to Respondent's employ just after the drive was getting underway and just 6 weeks before the representation petition was filed. He was a former shop steward for the same Union which was trying to organize Brooks Brothers and this fact was known to Respondent's management. Ellis' remarks to Peet, just a week before the discharge, that she thought Kurtz was behind the organizing drive was, in fact, management's perception of his role in the union effort. As the drive picked up steam just after Kurtz was hired, it is easy to see why Kurtz was looked upon as its principal mover.

The discharge of Kurtz was part and parcel of a management effort to assuage clothing salesmen who felt their commissions were being reduced by overstaffing. This effort was aimed at cooling their enthusiam for Local 400. As Respondent's pawn in this game, Kurtz would have acquired the status of a discriminatee, even if he had been entirely neutral in the organizational dispute. However, in light of Respondent's explanations of Kurtz' discharge, the reasons asserted are pretextual, since the timing, animus, and company knowledge of Kurtz' union sympathies more convincingly describe Respondent's actual motivation than do a host of petty complaints which were dredged up during his final week of employment to provide a patina of respectability for an illegal act. Accordingly, I conclude that, by discharging Ira Kurtz because of his membership in and activities on behalf of the Union, Respondent herein violated Section 8(a)(1) and (3) of the Act and engaged in objectionable conduct affecting the result of the election. Because Kurtz was illegally discharged, he was eligible to vote in the representation election which took place on November 21. Accordingly, the challenge to his ballot should be overruled and the ballot should be opened and counted.

Upon the foregoing findings of fact and upon the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following:

CONCLUSIONS OF LAW

1. Respondent Brooks Brothers, A Division of Garfinckel, Brooks Brothers, Miller & Rhoades, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local 400, UFCW International, AFL-CIO, is a labor organization within the meaning of the Act.

3. By discharging Ira Kurtz because of his membership in and activities on behalf of the Union herein, Respondent violated Section 8(a)(3) of the Act.

4. By the acts and conduct set forth above in Conclusion of Law 3; by implementing and announcing a program of dental insurance in order to influence the outcome of a representation election; by asking employees how they felt about the Union, how they thought the representation election would turn out, and what they hoped to gain by supporting the Union; by threatening employees that their union activities would be held against them when they were being considered for promotion to management positions; by threatening employees that collective bargaining would mean the loss of existing fringe benefits and a lowering of wages; by insisting that employees read company campaign literature and asking them if they had done so; by attempting to dissuade employees from supporting the Union and tell-

ing commission salesmen that a grievance concerning overstaffing had been remedied by discharging an individual; by discharging an employee in order to enhance the earning opportunities of other employees; and by telling employees that they were known as leading union adherents, Respondent violated Section 8(a)(1) of the Act.

5. The acts and conduct set forth above in Conclusions of Law 3 and 4 constitute objectionable conduct warranting the setting aside, under certain circumstances, of the representation election conducted at Respondent's Washington, D.C., store on November 21, 1980.

6. The unfair labor practices recited above have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent herein has engaged in certain unfair labor practices and objectionable conduct affecting the conduct of an election, I will recommend that it be required to cease and desist therefrom and to take other affirmative actions which are designed to effectuate the purposes and policies of the Act. Since the independent violations of Section 8(a)(1) of the Act found herein are repeated and pervasive, I will recommend to the Board a so-called broad 8(a)(1) order. *Hickmont Foods, Inc.*, 242 NLRB 1357 (1979). I will also recommend that Respondent be required to offer full and immediate reinstatement to Ira Kurtz to his former or substantially equivalent position, and that it make him whole for any loss of pay he may have suffered, in accordance with the *Woolworth*[14] formula, with interest thereon calculated at the adjusted prime rate used by the U. S. Internal Revenue Service for the computation of tax payments. *Olympic Medical Corporation*, 250 NLRB 146 (1980); *Isis Plumbing & Heating Company*, 138 NLRB 716 (1962). I will also recommend that Respondent be required to post the usual notice informing its employees of their rights and of the results of this case.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recommended:

ORDER[15]

The Respondent, Brooks Brothers, A Division of Garfinckel, Brooks Brothers, Miller & Rhoades, Inc., its officers, agents, supervisors, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union sympathies and activities.

(b) Threatening employees with loss of wages or benefits if they should select the Union as their bargaining agent.

(c) Instituting or announcing a dental plan or any other increase in wages or benefits for the purpose of influencing the outcome of a representation election; provided that nothing herein shall be construed to require Respondent to rescind or reduce any increase in wages or benefits heretofore granted.

(d) Telling employees that their union sympathies and activities were subject to company surveillance.

(e) Attempting to dissuade employees from supporting the Union by telling commission salesmen that a grievance concerning overstaffing had been remedied by discharging an employee.

(f) Telling employees that their union activities would be remembered and held against them when they were considered for promotion to management positions.

(g) Insisting that employees read company campaign literature and interrogating them as to whether they had done so.

(h) Conferring a benefit upon commission salesmen during the course of an organizing campaign by discharging another salesman in order to enhance the earning opportunities of remaining salesmen.

(i) Discouraging membership in and activities on behalf of United Food and Commercial Workers Union, Local 400, UFCW International, AFL-CIO, or any other labor organization by discharging employees or otherwise discriminating against them in their hire or tenure.

(j) By any other means or in any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions designed to effectuate the purposes and policies of the Act:

(a) Offer to Ira Kurtz full and immediate reinstatement to his former position or, in the event that his former position no longer exists, to substantially equivalent employment, without prejudice to his seniority or to other rights which he formerly enjoyed.

(b) Make whole Ira Kurtz for any loss of pay or benefits which he may have suffered by reason of the discrimination found herein, in the manner described above entitled "Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Washington, D.C., copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that

[14] *F. W. Woolworth Company*, 90 NLRB 289 (1950).

[15] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[16] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that Case 5-RC-11326 be, and it hereby is, severed from the two complaint cases and that it be, and it hereby is, remanded to the Regional Director for Region 5; and that the challenge to the ballot of Sandra Ellis which was cast in a representation election conducted in said case on November 21, 1980, be, and it hereby is, sustained, and that the challenge to the ballot of Ira Kurtz which was cast in the aforesaid election be, and it hereby is, overruled; and that the Regional Director be, and he hereby is, directed to open and count the challenged ballot of Ira Kurtz and to prepare and serve upon the parties a revised tally of ballots.

If the Petitioner receives a majority of the valid votes cast, the Regional Director shall issue a certification of representative. If the Petitioner does not receive a majority of the valid votes cast, according to the revised tally, IT IS FURTHER ORDERED that the election held on November 21, 1980, among certain employees at Respondent's Washington, D.C., store be set aside and that the Regional Director be directed to conduct a second election at such time as he deems that circumstances permit the free choice of a bargaining representative.